

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 11425-01

Martha Padilla
North Coast Seafood
Eastern Casualty Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Alfred E. Pearson, Esq., for the employee
John A. Smillie, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge awarded her a closed period of partial incapacity benefits pursuant to G. L. c. 152, § 35, on her claim for an increase in her incapacity benefits. The employee argues that the decision is tainted by error of law, due to the judge's improper admission of and reliance on the §11A medical report of Dr. Raymond Igou, who died before his deposition testimony could be obtained in these proceedings. (Dec. 2-3.) We agree, vacate the decision in part, and recommit the case for further findings.

The employee sustained a back injury due to a fall at work on February 28, 2001. (Dec. 5.) The insurer paid benefits pursuant to a § 10A conference order which, when the insurer withdrew its appeal, established the employee's ongoing entitlement to § 35 partial incapacity benefits. The employee then filed a claim for § 34 temporary total incapacity benefits, which claim was denied at a subsequent § 10A conference. (Dec. 2.)

On January 22, 2003, the employee underwent a medical examination, performed by Dr. Igou, pursuant to G. L. c. 152, § 11A(2). Dr. Igou died at some time thereafter, before he could testify regarding his findings and opinions. As a result, the judge declared his report inadequate due to the parties' inability to take the doctor's deposition, and allowed the parties to introduce their own medical evidence. (Dec. 3.) Pertinent to

the issue on appeal, the judge adopted the opinion of the insurer's expert physician, Dr. David J. Winnick, that the employee could return to her regular duties as a machine operator. The judge also made findings on the opinions of Dr. Igou, concluding with the finding, "Dr. Igou's opinions are supportive of Dr. Winnick's finding concerning the employee's disability." (Dec. 7.)

The employee argues that the judge impermissibly allowed Dr. Igou's § 11A medical report into evidence, and further erred by relying on that report in assessing the employee's present disability. We agree.

With Dr. Igou's death came his unavailability to testify at deposition. We have previously addressed this issue:

One of the safeguards to due process is the right to depose the § 11A examiner for purposes of cross-examination, O'Brien's Case, [424 Mass. 16] at 23 [1996]; G. L. c. 152, § 11A(2). Fairness requires that the report of the § 11A examiner "is open to . . . thoroughgoing challenge" by means of "the deposition and cross-examination procedure [which] gives a party the . . . 'opportunity to attack, discredit or refute the report.' " O'Brien's Case, supra at 24. "In any case where that opportunity [to depose and cross-examine the § 11A examiner] is insufficient, the statutory scheme may work a deprivation of due process as applied." Id. at 24.

. . .

Where there is an inability to cross-examine a medical witness, absent statutory exception, such physicians' reports are not admissible in evidence. See Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990) . . . Accordingly, we exclude the § 11A report from the evidence.

Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603, 606-607 (1997).

In the present case, the judge should have ruled that Dr. Igou's impartial medical report was inadmissible upon the suggestion of his death. Had the impartial medical report been excluded from evidence, the judge would not have been tempted to use it to bolster the adopted opinions of the insurer's expert physician, Dr. Winnick, as he did.

We therefore recommit the case for further findings on the medical evidence, excluding consideration of Dr. Igou's § 11A medical report. (Dec. 7.) Consistent with our disposition of this case, we once again decline to apply the departmental regulation, 452 Code Mass. Regs. § 1.12(5)(c), which provides that an impartial physician's

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unavailability shall render the report inadequate, but allows it to remain prima facie evidence at hearing notwithstanding.

The regulation directly contradicts the statutory right to cross-examination set forth in § 11A(2). Because application of the statutory right to depose the § 11A examiner is contravened by enforcement of the regulation, we are prohibited from applying it in this case. See G. L. c. 152, § 5. Therefore, we report the contradiction between the regulation and the statute to the Commissioner. See Appendix A; G. L. c 152, § 5; see also Corriveau's Case, 43 Mass. App. Ct. 924 (1997).

Martin, supra at 607 (footnote omitted). See also Tejada v. Copley Square Hotel, 14 Mass. Workers' Comp. Rep. 220, 222 (2000).

Accordingly, we vacate the findings on Dr. Igou's medical report, and recommit the case for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: May 4, 2005

Patricia A. Costigan
Administrative Law Judge

Appendix A

April 21, 2005

John C. Chapman, Commissioner
The Commonwealth of Massachusetts
Department of Industrial Accidents
600 Washington Street
Boston, MA 02111

RE:	Employee:	Martha Padilla
	Employer:	North Coast Seafood
	Insurer:	Eastern Casualty Insurance Co.
	Board No.:	011425-01

Dear Commissioner Chapman:

The reviewing board will soon file its decision in the above-named case. In the course of deciding the issues raised on appeal, we determined that the proper application of § 11A(2) of G. L. c. 152 is made impossible if 452 Code Mass. Regs. § 1.12(5)(c) is enforced. Accordingly, we have refused to apply that regulation in the instant case.

Pursuant to G. L. c. 152, § 5, be advised that, in our opinion, there is an explicit contradiction between the cited regulation and § 11A(2). Specifically, the regulation directly contradicts the statutory right to cross-examination conferred by § 11A(2).

Very truly yours,

Bernard W. Fabricant
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

BWF/ns

cc: Senior Judge James L. LaMothe, Jr.